

ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7647
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL (212) 973-0111
FAX (212) 891-9598

January 14, 2002

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Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

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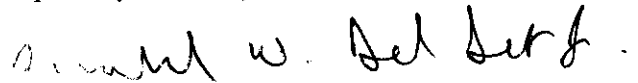
Re: CC Docket No. 01-347/Comments of Conversent Communications of New Jersey, LLC concerning the Application of Verizon New Jersey, Inc., *et al.*, for Authorization to Provide In-Region, InterLATA Services in New Jersey

Dear Ms. Salas:

On behalf of Conversent Communications of New Jersey, LLC ("Conversent"), and pursuant to the Commission's Public Notice issued in the above-referenced docket, transmitted herewith are an original and four copies of the companies' comments regarding the application of Verizon New Jersey, Inc., *et al.*, to provide in-region interLATA services in New Jersey.

Please date stamp and return the enclosed extra copy of this filing. Should you have any questions concerning this filing, please do not hesitate to contact Ron Del Sesto at (202) 945-6923.

Respectfully submitted,



Patrick J. Donovan
Ronald W. Del Sesto, Jr.

Counsel for Conversent Communications
of New Jersey, LLC

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Application by Verizon New Jersey Inc.,)
Bell Atlantic Communications, Inc.)
(d/b/a Verizon Long Distance),)
NYNEX Long Distance Company)
(d/b/a Verizon Enterprise Solutions),)
Verizon Global Networks Inc., and)
Verizon Select Services Inc., for)
Authorization To Provide In-Region,)
InterLATA Services in New Jersey)

CC Docket No. 01-347

**COMMENTS OF CONVERSENT COMMUNICATIONS OF
NEW JERSEY, LLC**

Conversent Communications of New Jersey, LLC ("Conversent" or "Company") submits these comments concerning the above-captioned application of Verizon New Jersey Inc. ("Verizon") for authority to provide interLATA services in New Jersey. Conversent is a Competitive Local Exchange Carrier ("CLEC") that provides facilities-based services in New Jersey. The Company serves its customers by installing a switch and transmission equipment, and by interconnecting to its collocation sites by ILEC provided transport, including dark fiber. Conversent obtains unbundled loops from Verizon in order to connect its collocation space to end-users' premises. Conversent's average customer has about six lines and many have only a single line. For the reasons stated herein, the Federal Communications Commission ("Commission") should deny the application of Verizon for authority to provide interLATA service in New Jersey.

I. VERIZON'S "HOT CUTS" PRICES WILL NOT PERMIT COMPETITION IN THE NEW JERSEY TELECOMMUNICATIONS MARKETPLACE IN VIOLATION OF SECTION 271 OF THE ACT

A. New Jersey "Hot Cut" Prices are Excessive

Because there is no retail equivalent to a "hot cut,"¹ Verizon must prove, in order to obtain Section 271 approval, that it provides unbundled loops through hot cuts "in a manner that offers an efficient competitor a meaningful opportunity to compete."² Implicit in this standard is the requirement that prices for hot cuts be set at a level that permits CLECs as a business matter to transfer ILEC customers to the CLEC.

The Commission must reject Verizon's application to provide in-region, interLATA services in New Jersey because the price for hot cuts recently set by the NJ BPU will not permit meaningful competition and thus violates checklist item number 4.³ On December 17, 2001, the NJ BPU released a Summary Order of Approval ("Summary Order") establishing rates for Verizon's Unbundled Network Elements ("UNEs").⁴ The rate established by the order is \$159.76 for a hot cut that does not require a premise's visit and \$73.01 for additional loops. For hot cuts that entail a site visit, the price is \$233.12 for the first loop and \$103.90 for additional

¹ A "hot cut" consists of manually disconnecting the customer's loop in the ILEC central office and reconnecting the loop at the CLEC's collocation space. It also involves coordinated switch software changes at Verizon's switch and the CLEC. The customer is taken out of service while the hot cut is in progress, thereby making the cut "hot," although if the cut is successful, the service disruption will last no more than five minutes.

² See *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, at ¶291 (1999)(citing *Application of BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20655 (1998)).

³ There are at least two separate provisions of Section 271 of the Act that Verizon violates through its pricing for hot cuts. The Commission may reject Verizon's 271 application on the basis that it fails the "public interest" test set out in Section 271(d)(3)(C) of the Act. See 47 U.S.C. § 271(d)(2)(3)(C). Alternatively, the Commission may find that the price for hot cuts is set at a level that mandates rejection based on Section 271(c)(2)(B)(iv) of the Act. See 47 U.S.C. § 271(c)(2)(B)(iv). This section requires that a BOC provide, "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."

⁴ See *Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc.*, Docket No. TO00060356 (rel. Dec. 17, 2001).

loops.⁵ Prior to the adoption of the Summary Order, the per loop hot cut charge was \$8.61 (with no premise's visit) with a \$23 service charge that could cover multiple lines. Obviously, these new rates represent very large increases over prior rates. The rates contained in the Summary Order represent an increase of more than 500% for a single line hot cut that does not require a premise's visit and a hot cut for 5-6 lines now costs several hundred dollars more than previously.⁶ In comparing the rates before and after the adoption of the Summary Order, it is clear that Verizon is attempting to discourage competition.

Furthermore, the new hot cut rates are excessive when compared to those in every Verizon state where Conversent does business. For example, the relevant rate in New York is \$29.75 for a hot cut regardless of whether a premises visit is required or not.⁷ In Massachusetts, the hot cut rate is \$25.43.⁸ Although TELRIC is not a specific formula and state agencies have a degree of flexibility to account for local conditions resulting in different rates in different states, there is no reasonable basis to assume that there are differences in local conditions that could justify an approximately 537% higher price for hot cuts from New York rates, and approximately 630% higher than hot cuts in Massachusetts. In fact, nowhere in Verizon's application, does it

⁵ See *Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc.*, Docket No. TO00060356 (rel. Dec. 17, 2001), attachment C. The \$159.76 rate is comprised of a service order charge of \$2.31 and an installation charge of \$157.45. The \$233.12 charge includes the \$157.45 charge plus \$73.36 for a premise's visit.

⁶ For example, prior to the adoption of the Summary Order, the total cost for the hot cut, not including the service order charge, would be \$43.05, *i.e.* 5 lines times \$8.61. Under the Summary Order, a Conversent request for 5 hot cuts that required a premise's visit, excluding service order charges, would cost a total of \$637.17. This sum is calculated by taken cost of \$230.81, that applies to the first loop, added to the the cost of the additional loops, which is the product of \$103.90 times 4. The service charge of \$2.31 per loop has been subtracted out. For hot cuts that do not require a premise's visit, the total cost for a hot cut would be \$430.25, again excluding service charges. The first loop costs \$157.45. This amount is added to the product of \$73.01 times the 4 remaining loops that constitute the 5 line order.

⁷ See *Verizon New York Tariff No. 10*, § 5.5.2, p. 47, 65.

⁸ See *Verizon Massachusetts Tariff No 17*. When Verizon's rates are compared to SouthWestern Bell Telephone rates for hot cuts in Texas, the disparity is even more extreme. The rate for a hot cut that does not require

offer reasons to justify the dramatic differences in price for hot cuts in New Jersey as compared to Massachusetts and New York. Verizon does not even mention the charge for hot cuts in its application. Clearly, Verizon would prefer that the Commission not scrutinize its inflated New Jersey rates. The fact that Verizon makes no attempt to justify these rates shows there is no basis for a finding that they are consistent with TELRIC.

B. Verizon's Prices for "Hot Cuts" in New Jersey Constitute a Price Squeeze

Conversent further submits that Verizon's hot cut prices are a classic instance of a "price squeeze," in which the monopolist prices its bottleneck facilities so that a would-be competitor who must purchase the monopolist's facilities cannot compete with the monopolist's end-user pricing. Such a price squeeze invariably precludes competition, and the Commission should not be a part of such an anti-competitive scheme. A price squeeze occurs when a firm with monopoly power on the wholesale level engages in a price increase that drives competitors out of the retail market allowing the monopolist to extend its monopoly power to the retail market.⁹

In this connection, the Commission must consider, as part of its public interest analysis, whether Verizon is engaging in a price squeeze. Any uncertainties that the Commission may harbor as to whether it should undertake such a review were recently answered by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in the *Sprint Appeal*.¹⁰ Similarly, in the *Sprint Appeal*, the D.C. Circuit found that since the Act "aims directly at stimulating competition, the public interest criterion may weigh more heavily towards

a premise's visit is \$17.61. See Texas 271 Agreement, Attachment 6: UNE, Appendix Pricing UNE, p. 10. This means that Verizon's rates for hot cuts in New Jersey are 900% more than the rates in Texas.

⁹ See *Cities of Anaheim v. FERC*, 941 F.2d 1234, 1250 (D.C. Cir. 1991). The price squeeze doctrine originated in *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-48 (2d Cir. 1945).

¹⁰ See *Sprint Communications Co. L.P. v. FCC*, Nos. 01-1076, 01-1081-01-1084, 2001 WL 1657297, at *4-*5 (D.C. Cir. Dec. 28, 2001) [hereinafter *Sprint Appeal*].

addressing potential 'price squeeze.'"¹¹ As stated by the D.C. Circuit "to the extent that an agency can confidently identify TELRIC rates only within some band, like those involved under conventional 'just and reasonable' regulation, the possibility exists that the agency has chosen too high a point within the band."¹² The D.C. Circuit has also made clear that the Commission may examine wholesale rates and adjust such rates to the lower level within "the zone of reasonableness."¹³ Verizon's rates for hot cuts in New Jersey clearly mandate the Commission adjusting hot cut rates prior to granting Verizon Section 271 authority for the State.

In weighing whether the price for hot cuts meets the public interest test set out in Section 271 of the Act, the relevant line of inquiry for the Commission to follow is whether UNE pricing "doomed competitors to failure."¹⁴ It is not a question of whether CLECs will be able to provide service at a profit but whether they will be able to compete at all. Conversent submits that it will not be able to meaningfully compete under Verizon's hot cut prices.

C. Verizon's Hot Cut Prices Will Foreclose Competition for Small- and Medium-Sized Business Customers

Because Verizon's hot cut prices are excessive and will establish a price squeeze, they will, at a minimum, foreclose CLECs from competing, especially for small- and medium-sized business customers. As noted, Conversent's business plan focuses on small- and medium-sized business customers. However, Verizon's high hot cut prices will result in CLECs competing only for the most lucrative customers, to the extent that they can compete at all. With hot cut rates set at a level so far above TELRIC, the only way CLECs could consider competing for

¹¹ *Sprint Appeal*, 2001 WL 1657297, at *5.

¹² *Sprint Appeal*, 2001 WL 1657297, at *4.

¹³ *Sprint Appeal*, 2001 WL 1657297, at *4 (quoting *Federal Power Comm'n*, 426 U.S. 271, 279 (1976)).

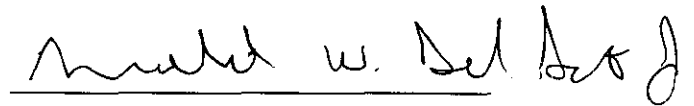
¹⁴ *Sprint Appeal*, 2001 WL 1657297, at *4 (emphasis in original).

customers is to serve those that spend the most on telecommunications services, *i.e.* very large business customers. Conversent cannot reasonably pay \$300-\$400 for hot cuts for a customer with 5 to 6 business lines. Conversent hereby affirms that it would be necessary for it to abandon in New Jersey its present business plan if Verizon implements the new hot cut prices. Thus, Verizon's high hot cut prices would thwart competition generally, but especially in the small business, and residential, markets. Conversent emphasizes that it takes no exception to Verizon's hot cut performance from an operational perspective. Indeed, Conversent believes that VZ has done a good job in performing hot cuts and in responding to trouble reports. Rather, Conversent's concern is with the non-recurring charge associated with hot cuts.

II. CONCLUSION

The Commission must reject Verizon's application for 271 authority in New Jersey because its charges for hot cuts would foreclose meaningful competition in that state.

Respectfully submitted,



Scott Sawyer
Vice President, Regulatory Affairs
Conversent Communications of
New Jersey, LLC
222 Richmond Street, Suite 206
Providence, RI 02903
(401) 490-6377 (Telephone)
(401) 272-9751 (Facsimile)

Andrew D. Lipman
Patrick J. Donovan
Ronald W. Del Sesto, Jr.
Swidler Berlin Shereff Friedman,
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7643 (Facsimile)

Counsel for
Conversent Communications of
New Jersey LLC

January 14, 2002

CERTIFICATE OF SERVICE

I, Bernadette T. Clark, a secretary with the law firm Swidler Berlin Shereff Friedman, LLP, hereby certify under penalty of perjury that on January 14, 2002, a copy of the foregoing Comments were served on the following:

Magalie Roman Salas, Secretary*
Office of the Secretary
Federal Communications Commission
TW-B204
445 Twelfth Street, S.W.
Washington., DC 20554

Janice Myles*
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
Room 5-C327
445 Twelfth Street, S.W.
Washington, DC 20554

Qualex International*
Portals II
445 12th Street, S.W., Room CY-B402
Washington, DC 20554

Evan T. Leo**
Scott H. Angstreich
Kellogg, Huber, Hansen, Todd &
Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

James G. Pachulski**
TechNet Law Group, P.C.
1100 New York Avenue, N.W.
Suite 365
Washington, D.C. 20005

John M. Lynch**
U.S. Department of Justice
Antitrust Division
Telecommunications Task Force
1401 H St. NW, Suite 8000
Washington, DC 20530

Anthony Centrella, Director***
Division of Telecommunications
New Jersey Board of Public Utilities
Two Gateway Center
8th Floor
Newark, NJ 07102

Michael E. Glover ***
Karen Zacharia
Leslie V. Owsley
Donna M. Epps
Joseph DiBella
Verizon
1515 North Court House Road
Suite 500
Arlington, Virginia 22201

Bruce D. Cohen***
A. Ayo Sanderson
Verizon New Jersey Inc.
540 Broad Street
Second Floor
Newark, New Jersey 07101
(973) 649-2656

*Via Courier (to 236 Massachusetts Ave., N.E., Suite 110
Washington, D.C. 20002)

**Via Overnight Delivery

***Via First Class Mail


Bernadette T. Clark